Supreme Court, U. S.
FILED
DEC 27 1976
MICHAEL RODAK, JR., CLERK

(G-158)

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-721

ALPHONSE VITELLO,

Claimant-Appellant,

— against —

THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS APPEAL AND BRIEF

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TABLE OF CONTENTS

	Page
Motion to Dismiss Appeal and Brief	1
The Nature of the Case	1
United States Statutes Involved	4
Rules of the United States Supreme Court Involved	5
New York State Statutes Involved	6
Decision of the New York Court of Appeals	8
ARGUMENT:	
POINT I — The appeal should be dismissed because the notice of appeal and the jurisdictional statement were not timely filed	9
POINT II — The appeal should be dismissed on the further ground that there was no Federal question considered or decided by the Court of Appeals	11
Conclusion	13

Case Cited:

Department of Banking of Nebraska v. *Pink*, 317 U.S. 264 (1942), rehearing denied 318 U.S. 802 (1942)	9

Laws Cited:

New York State Correction Law Sec. 383	6
New York State Correction Law Sec. 384	2, 6, 12
New York State Mental Hygiene Law Sec. 70	2, 12
New York State Mental Hygiene Law Sec. 74	2, 7, 12
28 U.S.C. 2101	4, 9
28 U.S.C. 1257	4, 9
United States Supreme Court Rule 14(2)	4, 5

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The appellee moves the Court to dismiss the appeal herein on the ground that the notice of appeal was not timely filed and on the further ground that it is manifest that no substantial Federal question was raised in the court below.

The Nature of the Case

The appeal raises the question of the alleged violation of constitutional and civil rights of appellant Alphonse Vitello. Alphonse Vitello filed a claim on April 26, 1969 for false imprisonment by reason of his confinement to Dannemora State Hospital in the New York State Court of Claims*. The Court

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* The New York State Court of Claims will hereafter be referred to as Court of Claims.

of Claims rendered a judgment in favor of claimant for $100, 333.33 (29a)*. The Court of Claims found that claimant was retained in New York State institutions after the determination of a prison sentence and that his retention was not secured under the proper New York State law** and therefore the institution lacked the authority to retain him. The Court of Claims dismissed all other causes of action by claimant including that of alleged improper treatment and medication during his stay in the New York State institution and found that he had not proven that he was improperly treated during the period that he was in the State institutions (13a-27a).

An appeal was taken by the appellee to the New York State Supreme Court, Appellate Division, Third Department***, which by order dated June 17, 1975 reversed the judgment of the Court of Claims on the law and the facts and dismissed the claim (9a-10a). The Appellate Division noted that there were three causes of action against the State, to wit (7a):

> "asserting lack of proper medical and physical care, false imprisonment, and a violation of his constitutional and civil rights as a result of his unlawful detention."

and further that claimant in the Appellate Division only contested the adequacy of the award and not the other findings made by the Court of Claims.

The Appellate Division reversed the judgment of the Court of Claims and dismissed the claim by order dated June 17,

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* Numbers in parenthesis refer to pages in Appellant's Jurisdictional Statement.

** The Court of Claims stated that the application should have been made under the then provisions of the New York State Correction Law, Sec. 384 but was in fact made under New York State Mental Hygiene Law, Sections 70 and 74.

*** The New York State Supreme Court, Appellate Division, Third Department will hereinafter be referred to as the Appellate Division.

1975. In its memorandum decision dated June 12, 1975, it held that it was incumbent on claimant to demonstrate that he had been damaged by his alleged illegal detention and that he failed to sustain proof of the same (7a-8a).

Claimant appealed to the New York State Court of Appeals* from the order of the Appellate Division reversing the judgment of the Court of Claims. The Court of Appeals rendered its decision on June 2, 1976, affirming the dismissal of the claim and issued a remittitur to the Court of Claims to proceed in accordance with its decision (1a-2a). The remittitur was also dated June 2, 1976. Pursuant to and as directed by the remittitur of the Court of Appeals the Court of Claims entered a further judgment dismissing the claim on September 10, 1976 (3a). No mention of a constitutional question was made either in the decision or remittitur of the New York State Court of Appeals.

On November 16, 1976, this office received from George V. O'Haire, appellant's attorney, a notice of appeal to the Supreme Court of the United States on behalf of the appellant. This notice of appeal stated that it was from (30a):

> "a final Judgment entered in the Office of the Clerk of the Court of Claims, State of New York, on the 10th day of September, 1976, upon an order of the Court of Appeals of the State of New York."

The appeal to the Supreme Court of the United States would not be from this judgment of the Court of Claims but from the order and remittitur of the Court of Appeals dated June 2, 1976.

Thereafter, appellee by notice of motion to the Court of Claims and upon affidavit of Jeremiah Jochnowitz dated November 19, 1976, made a motion to the Court of Claims returnable on December 7, 1976 to dismiss the appeal.* This

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* The New York State Court of Appeals will hereinafter be referred to as Court of Appeals.

* This motion was adjourned pending the decision by this Court on the instant motion.

motion was made pursuant to Rule 14(2) of the Rules of the Supreme Court of the United States to the Court of Claims, the Court which had possession of the records in the case.

On November 26, 1976 the jurisdictional statement in this matter was received by this office and on November 29, 1976 we were advised by Wallace and O'Haire that the jurisdictional statement was docketed on November 23, 1976 with docket number 76-721.

United States Statutes Involved

28 United States Code (Judiciary and Judicial Procedure), Sec. 1257.

"Sec. 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

28 United States Code (Judiciary and Judicial Procedure), Sec. 2101(a)(b)(c).

"Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title,

holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Rules of the United States Supreme Court Involved

Rules Supreme Court United States (14)

"14.

DISMISSING APPEALS FOR NON-PROSECUTION

1. After a notice of appeal has been filed, but before the case has been docketed in this court, the parties may at any time dismiss the appeal by stipulation filed in the court possessed of the record, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 60.

2. If an appeal which has been noted is not docketed in this court within the time for docketing, plus any enlargement thereof duly granted, the court possessed of the record may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such orders thereon with respect to costs as may be just.

3. If an appeal which has been noted is not docketed in this court within the time for docketing, plus any enlargement thereof duly granted, and the court possessed of the record has for any reason denied an appellee's

motion, made as provided in the foregoing paragraph, to dismiss the appeal, the appellee may have the cause docketed and the appeal dismissed in this court, by producing a certificate, whether in term or vacation, from the clerk of the court possessed of the record, establishing the foregoing facts, and by filing a motion to dismiss, which shall conform to Rule 35 and be accompanied by proof of service as prescribed by Rule 33. The clerk's certificate shall be attached to the motion, but it shall not be necessary for the appellee to file the record. In the event that the appeal is thereafter dismissed, the court will give judgment against the appellant and in favor of appellee for costs. In no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this paragraph, unless by special leave of court."

New York State Statutes Involved

New York Correction Law, Sections 383, 384, as they existed in 1938:

"Sec. 383. Transfer of prisoners in state prisons, reformatories and penitentiaries and in the institution for male defective delinquents to Dannemora state hospital. Whenever the physician or the psychiatrist of any one of the state prisons, reformatories or penitentiaries or of the institution for male defective delinquents shall certify to the warden or superintendent thereof, that a male prisoner confined therein and sentenced or committed thereto for a felony, is, in his opinion insane, such warden or superintendent shall cause such prisoner to be transferred to the Dannemora state hospital and delivered to the medical superintendent thereof. Such superintendent shall receive the prisoner into such hospital, and retain him there until legally discharged. The warden or superintendent, before transferring such insane prisoner, shall see that he is in a state of bodily cleanliness, and is provided with a new suit of clothing similar to that furnished to prisoners on their discharge from prison. At the time of such transfer, there shall be transmitted to the superintendent of such hospital the original certificate of conviction and the certificate of insanity executed by the physician or psychiatrist, which shall be filed in the office of such superintendent, who shall file a notice of such transfer in the office of the department of correction."

"Sec. 384. Retention of insane prisoners after the expiration of their terms

When the term of a prisoner confined in Dannemora state hospital has expired, and, in the opinion of the superintendent, such prisoner continues insane, the superintendent shall aply to a judge of a court of record to cause an examination to be made of such person, by two legally qualified examiners, other than a physician connected with such hospital, qualified as provided in the mental hygiene law. Such examiners shall be designated by the judge to whom the application is made. Such examiners, if satisfied, after a personal examination, that such prisoner is insane, shall make a certificate to such effect in the form and manner prescribed by article five of the mental hygiene law, for the commitment of insane persons to state hospitals. Such superintendent shall apply to a judge of a court of record for an order authorizing him to retain such prisoner at the Dannemora state hospital accompanying such application with such certificate in lunacy. Such judge, if satisfied that such prisoner continues insane, shall issue such order of retention, and such superintendent shall thereupon retain the prisoner at Dannemora state hospital until discharged as provided by law. The certificate in lunacy and order of retention shall be kept by the superintendent in his office, and a copy thereof shall be filed in the office of the department of mental hygiene. The costs necessarily incurred in determining the question of insanity, including the fees of the medical examiners, shall be a charge upon the amount appropriated for the support and maintenance of the Dannemora state hospital, and be paid in the same manner as are other expenses of such hospital."

New York Mental Hygiene Law, Sec. 74, as it existed in 1938:

"Sec. 74. Admission on court commitment. 1. A person alleged to be insane, and who is not in confinement on a criminal charge, may be committed to and confined in an institution for the custody and treatment of the insane, upon an order made by a judge of a court of record of the city or county, or a justice of the supreme court of the judicial district in which the alleged insane person resides or may be, adjudging such person to be insane, upon a certificate made by two qualified examiners, accompanied by a verified petition therefor, or upon such certificate and petition, and after a hearing, as provided in this section.

* * *

3. Except as hereinafter provided, notice of such application shall be served personally, at least one day before making such application, upon the person alleged to be insane. Notwithstanding the foregoing provision, if the judge to whom application is made, be satisfied from any statement contained in the papers in the proceedings, or from inquiry, that personal service of the notice on the alleged insane person would be ineffective or detrimental to such person, he may, in his discretion, dispense therewith, and he shall dispense therewith, if the qualified examiners state in writing, under oath, that personal service upon the alleged insane person would in their opinion be detrimental to such person. However, whether such personal service on the alleged insane person be dispensed with or not, and the petition be made by a person other than the wife, husband, father, mother or other nearest relative, such notice shall be served upon such wife, husband, father, mother or other nearest relative of such alleged insane person, if there be any such person known to be within the county; if not, upon the person with whom such alleged insane person may reside, or at whose home he may be, or in their absence, upon a friend of such alleged insane person; and if there be no such person or persons, such service shall in writing be dispensed with."

Decision of the New York Court of Appeals
(1a-2a)

The Court of Appeals handed down its memorandum decision on June 2, 1976. In its decision, it said (1a):

> "The order of the Appellate Division should be affirmed. Appellant failed to establish, as is necessary for a recovery, that he was sane at the time of his original commitment to Dannemora State Hospital or that he recovered his sanity at any time during his subsequent 29-year stay. (*Dennison* v. *State of New York*, 28 AD2d 608, affd 23 NY2d 996, cert den 397 US 923.)"

It did not mention any other questions as being passed on.

ARGUMENT

POINT I

THE APPEAL SHOULD BE DISMISSED BECAUSE THE NOTICE OF APPEAL AND THE JURISDICTIONAL STATEMENT WERE NOT TIMELY FILED.

In his notice of appeal, appellant states that he is appealing from a final judgment entered in the Court of Claims on the 10th day of September, 1976 "upon an order of the Court of Appeals". 28 United States Code 1257 (Judiciary and Judicial Procedure) provides that appeals are to be taken from the State's highest Court from which the decision was rendered. The highest Court in this case was the New York Court of Appeals and its decision and remittitur both were dated June 2, 1976. It was necessary that appellant file both the notice of appeal and the jurisdictional statement within 90 days of that date (28 U.S.C. 2101). The notice of appeal is dated November 12, 1976, more than 90 days after the Court of Appeals decision and remittitur. The jurisdictional statement was filed on November 23, 1976, even later.

Appellant appears to take the position that the appeal is from the judgment of the Court of Claims which was entered on September 10, 1976. The appeal is not taken from the judgment of the Court of Claims but from the highest Court of the State which rendered its decision in the matter and in this case that was the New York Court of Appeals. This question was considered in *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264 (1942) rehearing denied 318 U.S. 802 (1942). In that case this Court considered the question of when the time to appeal to the Supreme Court of the United States starts running from an order of a State appellate court where it directs a lower State court to enter a judgment based on its decision. This Court said (pp. 267-268):

> "Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two

cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in the one court or the other, since we have ample power to obtain it from either. *Alterton* v. *Fowler*, 91 U. S. 143, 146. In reliance upon the early decision in *Green* v. *Van Buskerk*, 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order of the New York Court of Appeals, but from the judgment subsequently entered by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under Sec. 237 of the Judicial Code, 28 U.S.C. Sec. 344, and cannot be sanctioned. See especially Chief Justice Waite's opinion in *Mower* v. *Fletcher*, 114 U.S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. See also *Wurts* v. *Hoagland*, 105 U.S. 701, 702, and *Clark* v. *Williard*, 292 U.S. 112, 117-118. This rule applies with equal force to cases from New York in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of Sec. 237 of the Judicial Code, a final judgment reviewable here.

* * *

"Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

Since the decision of the Court of Appeals in the instant case determined the matter and the Court of Claims entering a judgment on the remittitur was merely a ministerial act required by it under the mandate of the Court of Appeals, claimant's time to appeal ended ninety days after June 2, 1976, the date of the Court of Appeals judgment, and therefore the filing of the notice of appeal and the jurisdictional statement were not timely.

POINT II

THE APPEAL SHOULD BE DISMISSED ON THE FURTHER GROUND THAT THERE WAS NO FEDERAL QUESTION CONSIDERED OR DECIDED BY THE COURT OF APPEALS.

The Court of Appeals in its decision and in its remittitur in this case made no mention of a Federal question. The decision of the Court of Appeals shows that it was on the facts in that it held that claimant-appellant had not proved that he was damaged by the State's action.

The Appellate Division stated that although originally there were three causes of action, one of which included an alleged violation of appellant's constitutional and civil rights, this cause of action was dismissed by the Court of Claims and that before, the Appellate Division was the only ruling of the Court of Claims which claimant was contesting; viz: the adequacy of the damages awarded. The Appellate Division said in its opinion (7a):

> "Claimant alleges three causes of action in his claim against the State, asserting lack of proper medical and physical care, false imprisonment, and a violation of his constitutional and civil rights as a result of his unlawful detention. The trial court dismissed the first and third causes of action, but found that the 1938 proceeding was illegal and awarded claimant $100,000 damages for false imprisonment. Since claimant here only contests the adequacy of the award, we need not concern ourselves with

> the first and third causes of action. The State appeals from the judgment, contending that the claimant is not entitled to damages for the reason that he failed to demonstrate that he was sane for any period during his confinement. We agree."

The Court of Claims found against the State because the State allegedly, under the wrong State law, retained the claimant in its institution as an insane person who could not be safely released. The Court of Claims said that the State acted under sections 70 and 74 of the New York State Mental Hygiene Law in effect at that time when it should have done so under section 384 of the Correction law in existence at that time. The basic question for the New York appellate courts to consider was whether appellant proved that he was damaged by his continued commitment under the allegedly wrong law. If he failed to prove this, then his commitment under the wrong law was not the proximate cause of whatever damages he may have suffered. It was incumbent on appellant in the State court to show that he was damaged. To do so, the Court of Appeals stated he would have to prove that he was sane during some of the period he was in the State's institution. It should be noted that no Court found that claimant was sane during this period. The Court of Claims in its opinion said (25a-26a):

> "The burden of proof remains on the claimant to establish every element of his claim, including the claim that he was sane during all the time he was confined.
>
> * * *
>
> "The doctors who had claimant under their supervision found him to be psychotic.
>
> "On the proof before me, claimant has not established that he was sane during that period. Claimant, in this regard, has failed to sustain the burden of proof."

The sole question before the Court of Appeals was whether the reversal by the Appellate Division because there had been no proof that claimant had been sane during his period of stay in the institution was correct. The Court of Appeals in its

memorandum shows that this was the only question decided by it. The question of whether the act of the State in having claimant held in a State institution under a possibly wrong section of law had damaged him is not a Federal constitutional question and therefore there is no substantial constitutional question involved in this case. It follows therefore that the appeal should be dismissed.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED.

Dated: December 13, 1976.

Respectfully submitted,

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